Supreme Court, U.S.
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No. A 94-651

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1994

EXPORTADORA DE SAL, S.A. DE C.V.,

Petitioner,

vs.

HIROKO SUGIMOTO, et al.,

Respondents

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

RESPONDENTS' SUPPLEMENTAL BRIEF IN REPLY TO BRIEF OF AMICUS CURIAE UNITED MEXICAN STATES AT THE PETITION STAGE

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I. THE AGREEMENT IS NOT APPLICABLE.

A. Mexico's Translation is Incomplete and Misleading: The Agreement did not Go Into Effect Until After the Accident.

The United Mexican States ("Mexico") has not translated the preamble and Article XII of the document in its appendix ("federal registry" - "Diario Official" of April 25, 1988 - the "agreement"). (AM 3-8) [1] Untranslated provisions state that the agreement went into effect on December 17, 1987, *three months after the accident of September 30, 1987*, on the day the government of Japan received written notification from the government of Mexico that the United Mexican States had completed the constitutional procedures to put the agreement into practice. (A 318) The preamble further provides that the agreement was approved by the Mexican Senate on October 22, 1987, 22 days after the accident. (A 316) The notification required to put the agreement in effect under Article XII was given in Tokyo on December 17, 1987 and on January 28, 1988. (A 316 ¶ 6)

The agreement that Mexico has presented to the Court as *amicus* went into effect after the accident. A certified translation of the preamble and Article XII is set forth in the accompanying appendix. (A 315-318)

The federal registry agreement is not applicable.

B. Mexico's Brief Admits that Exportadora did not Know of the Agreement until After the Accident.

Mexico's *amicus* brief admits that petitioner Exportadora De Sal, S.A. De C.V. ("Exportadora") did not

[1] Mexico's appendix as amicus is cited "AM" followed by the page number.

know of the agreement until "after the interlocutory appeal but before trial." (Amicus Brief at 4) In other words, Exportadora did not even know of the agreement, and thus was not acting under the agreement, at the time of the accident.

C. Mexico's Request for Judicial Notice is Unreasonable and Contrary to California Law as the Choice of Law.

Mexico's amicus curiae brief is submitted by John Stephens as counsel, who represented Exportadora in its prior interlocutory appeal. Schoenberg v. Exportadora De Sal, S.A. De C.V., 930 F.2d 777 (9th Cir. 1991).

During oral argument of that appeal, on March 6, 1991, Mr. Stephens stated that he was in possession of "an official diary from the Mexican government . . . [and] it does refer to what is intended between Mexico and Japan . . . ." (A 291)[2] - apparently the same document. (AM 3-8)

Mr. Stephen's unsworn statements as to what two foreign governments intended are hearsay, lack foundation, are not based upon personal knowledge, and are objected to as such. Respondents object and move to strike Mr. Stephens' assertions, contained in Mexico's *amicus* brief, and to strike the inapplicable federal registry. The agreement is not in the record of the courts' below.

Mexico's request for judicial notice at the petition stage in the Supreme Court fails to give reasonable written notice as required. Rule 44.1, Fed.R.Civ.P. Where no reasonable written notice was given in the courts below, the request for judicial notice should be denied. Ruff v. St.Paul Mercury Ins. Co., 393 F.2d 500, 502 (2nd Cir. 1968).

Mexico, in requesting judicial notice of a matter of

[2] Mr. Stephens statement of March 6, 1991 to the Ninth Circuit is set forth verbatim in the accompanying appendix to this supplemental brief.

Mexican law, is arguing in effect for the application of Mexican law to the case. The choice of law in this case is California law, a decision that Exportadora has not challenged in the courts below, nor in this Court. Schoenberg at 783-784. (A 101-103) Exportadora's counsel agreed at trial that California law applies. (A 222)

D. The Court Should not Take Judicial Notice of an Extra-Record Document not Produced in Response to Orders to Compel, Which no Witness Connected to the Facts of the Case.

No witness testified in this case that any such agreement between Japan and Mexico existed. The sworn testimony was the exact opposite - Exportadora's President, Juan Bremer, testified that there was no agreement with Japan until after the accident. (A 234-235) At the time of the accident, by contrast, "it was the Japanese partners [Mitsubishi], yes, that invited Tottori [University scientists], and Exportadora that accepted them in those days." (A 234) The government of Mexico *asked* Exportadora to assist the agricultural project (A 224) *the request was not an order.* (A 234)

Plaintiffs requested documents from petitioner Exportadora on June 27, 1991 and December 6, 1991 (A 296; A 306), *"pertaining to any request and/or instruction by the government of Mexico to Exportadora to assist the agricultural project . . . request and/or instruction to Exportadora to provide transportation or accommodations to people traveling to the agricultural project"* (A 297 ¶ 4, 6, 7); an earlier request was made in 1990.

Orders to compel production of documents were issued on August 24, 1990, November 21, 1991 (A 300-303) and January 15, 1992. (A 310-313)

The federal registry document was never produced in discovery and is not in the record. It surfaced for the

first time in Mexico's *amicus* brief about November 10, 1994, more than three years after the document was in Mr. Stephens' possession. The inference is that the document is not responsive to the orders to compel, that it does not pertain to the transportation in the case.

The Court should not take judicial notice of foreign law in the complete absence of expert testimony to show its relevance. *The absence of expert testimony raises an inference that the foreign law is contrary to the construction advanced by the proponent.* Dulles v. Katamoto, 256 F.2d 545, 547 (9th Cir. 1958).

Foreign law is usually proved by expert testimony accompanied by extracts from foreign legal materials. 9 Wright & Miller, Federal Practice and Procedure, Civil § 2444, p. 406. No expert witness has connected the federal registry as applicable to this case. To the contrary, *the sworn testimony of Exportadora's witnesses in the trial record is that the Japanese scientists were carried at the request of Mitsubishi as a courtesy to a stockholder.* (A 233-235, 243-244) This is consistent with the district court's findings in 1989 (A 127), as affirmed in Schoenberg at 781. (A 97) And consistent with the findings in 1993 (A 61 F 120; A 66 F 128), as affirmed. (A 7) Sugimoto v. Exportadora De Sal, S.A. De C.V., 19 F.3d 1309, 1310-1311 (9th Cir. 1994).

Mitsubishi was not carrying out any technical cooperation agreement in requesting transportation for these university scientists. If the issue is one of fact, the Court should not take judicial notice of a document that is not a new development that could not have been included in the record of the courts below. Zell v. Jacoby-Bender, Inc., 542 F.2d 34, 38 (7th Cir. 1976). [3]

The Court should not take judicial notice of hearsay, such as counsel's extra-record assertions that attempt to connect the April 1988 federal registry to a 1987 accident.

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[3] Mexico's translation was certified on July 11, 1991. (AM 8)

United States v. Glass, 744 F.2d 460, 461 (5th Cir. 1984); Kemlon Products & Development Co. v. United States, 646 F.2d 223, 224 (5th Cir. 1981).

E. Mexican Law is Contrary to Mexico's Contentions.

Under Mexican law an international agreement usually goes into legal effect one working day after it is published in the federal registry, unless the agreement specifies another effective date. Article 284, Federal Code of Civil Procedure, United Mexican States. Respondents request that the Court take judicial notice that Mexican law is contrary to Mexico's *amicus* contentions.

II. MEXICO CONFUSES PURPOSE WITH NATURE.

Mexico's contends that the transportation of the scientists was not commercial because private persons do not transport foreign scientists for the purpose of fulfilling an international agreement. (Amicus Brief at 6) Mexico misstates the facts. There is no evidence of that purpose.

Even if, for the sake of argument, Mexico had an effective agreement with Japan, it would make no difference. Mexico's *amicus* argument confuses purpose with nature. Exportadora's transportation link between corporate offices was part of Exportadora's commercial activity. (A 126-127) The focus is on the specific acts that form the basis of the suit. Joseph v. Office of Consulate General of Nigeria, 830 F.2d 1018, 1023 (9th Cir. 1987).

Mexico's purpose in requesting that Exportadora transport the scientists is not relevant to the nature of Exportadora's transportation activity as commercial. It would make no difference what Mexico's purpose was if Mexico arranged for tickets to be issued through an Aero Mexico office in San Diego to scientists for a commercial

Aero Mexico flight. The Court would still have jurisdiction over Aero Mexico under the commercial activities exception when the flight crashed in San Diego. And it makes no difference where Mexico requested that Exportadora transport scientists without tickets, with the transportation arranged through Exportadora's San Diego office, on Exportadora's commercial transportation link. The flight was still commercial. The Court has jurisdiction over Exportadora under the commercial activities exception when the flight crashed in San Diego.

III. MEXICO MISSTATES THE FACTS.

Mexico misstates the facts in asserting that the scientists were transported at the "instruction" of Mexico (Amicus Brief at 3) or that Mexico "directed" Exportadora to transport the passengers. (Amicus Brief at 6) To the contrary, as *Mr. Bremer testified, "they [the government of Mexico] didn't order us to do things" (A 234), "there could have been a request . . . there were no orders given . . . and Mitsubishi was interested in these professors' studies of the desert . . . ." (A 235)* The findings are correct. (A 17-19) (transportation was requested by Mitsubishi)

Mexico was not "deprived of the opportunity to introduce the agreement at trial" as the *amicus* brief misstates. (Amicus Brief at 3) Exportadora waived sovereign immunity at trial (A 219-221) and chose not to offer evidence on jurisdiction. (A 221)

IV. THE CLAIMS ARE BASED ON EXPORTADORA'S COMMERCIAL ACTIVITY IN THE UNITED STATES.

Mexico misstates the holding in Schoenberg in asserting that arranging transportation through the San Diego office was the only basis for jurisdiction. (Amicus

Brief at 12) To the contrary, Exportadora's transportation of the decedents in the United States was held to be an additional basis for subject matter jurisdiction. Schoenberg at 780-781. (A 96-98) The second panel also found that an element of plaintiffs' claim consisted of Exportadora's transportation of decedents inside the United States. Sugimoto at 1311. (A 7)

The elements of plaintiffs' wrongful death claims, based upon breach of the implied contract for round trip transportation from San Diego, non-delegable duty, and ostensible agency all contain elements consisting of Exportadora's commercial activities in the United States. The implied contract was arranged through the San Diego office and made in California when Exportadora accepted the passengers for carriage in San Diego.

The passengers' reliance on Exportadora as the carrier, and some of Exportadora's manifestations for ostensible agency that Exportadora was the carrier, began through the San Diego office when Exportadora accepted Mitsubishi's request for transportation on the company airplane, and continued when the passengers were met by Exportadora's representatives in San Diego and transported by Exportadora in San Diego at the outset. [4]

The non-delegable duty was assumed in San Diego. The flight was purposefully directed towards the United

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[4] Certainly Exportadora's implied invitation to the decedents to travel to the forum state, California, in order to be transported to Guerrero Negro, was purposeful availment of conducting activities in the forum state, invoking the benefits and protections of California law. So too were Exportadora's routine operation of a transportation link from San Diego, its operation of a San Diego office, and its operation of, or instructions to, airplanes flying in California. Burger King Corp. v. Rudzewicz, 471 U.S. 462, 475, 85 L.Ed.2d 528, 542, 105 S.Ct. 2174 (1985). As the district court found in 1989: *"In having its corporations transport passengers in California airspace, Mexico should fully expect to be held accountable under California law."* (A 143)

States by Exportadora. As to all theories of the case, the duty of care was breached in the United States. The decedents were killed in the United States as a proximate result of breach of the duty here.

The commercial activities of Exportadora are a sufficient course of conduct for subject matter jurisdiction. Keeton v. Hustler Magazine, Inc., 465 U.S. 770, 774-777, 79 L.Ed.2d 790, 797-799, 104 S.Ct. 1473 (1984).

V. MEXICO ADMITS THE NATURE OF THE FLIGHT WAS COMMERCIAL.

Mexico admits that Exportadora's transportation of Omachi was commercial. (Amicus Brief at 11) Nothing distinguishes the transportation of Omachi from the transportation of the other passengers, other than Mexico's assertions as to its extra-record purpose. In admitting that Omachi's transportation was commercial, Mexico admits in effect that the other passengers on the same flight were carried on a commercial flight.

VI. THE COMMERCIAL ACTIVITIES EXCEPTION APPLIES TO NEGLIGENCE IN A COMMERCIAL ACTIVITY.

Mexico contends that Saudi Arabia v. Nelson, 507 U.S. - - , 113 S.Ct. 1471, 123 L.Ed.2d 47 (1993) held that tort claims may not be based upon commercial activity. Saudi Arabia did not so hold. In Saudi Arabia the activity was abuse of police power, a sovereign activity.

If the nature of the activity is commercial, and if in the course of that activity personal injuries occur, the negligence that caused those injuries was commercial activity. To hold otherwise would be to hold that negligence is not an act that a private person can perform. Negligence is not a sovereign activity, as Mexico's contentions imply.

The plain reading of the commercial activities exception of the FSIA is that the exception applies to any case based upon commercial activity. The exception as enacted does not exclude personal injuries or wrongful death caused by commercial activity.

Federal Ins. Co. v. Richard I. Rubin & Co., Inc., 12 F.3d 1270, 1289 (3rd Cir. 1993) did not hold otherwise. Federal Insurance merely held that the commercial activity of a holding company in forming and financing subsidiaries was not an element of any of the claims alleged. In the present case Exportadora acted directly, not through a subsidiary, in undertaking the carrier and passenger relationship with decedents in the United States, in entering into an implied contract with decedents to transport them non-negligently from and to the United States, and in undertaking a non-delegable duty in the United States.

VII. THE FLIGHT WAS EXPORTADORA'S COMMERCIAL ACTIVITY.

Mexico contends that there is no theory of vicarious commercial acts in jurisprudence. Mexico is mistaken. The theory of vicarious commercial acts is called agency. The charter from Aviones De Sonora, S.A. ("Aviones") was a substitute for the Exportadora company airplane, acting on behalf of Exportadora. (A 31 F 49; A 52 F 104)

Under a nondelegable tort duty the principal is liable for the negligence of his agent, "whether his agent was an employee or an independent contractor." Maloney v. Rath, 69 Cal.2d 442, 446 (1968). Contractual duty to perform a service is non-delegable. Harold A. Newman Co. v. Nero, 31 Cal.App.3d 490, 496 (1973). Aviones was Exportadora's agent under non-delegable duties.

Commercial acts on behalf of the principal by an agent in the United States under the FSIA are attributable

to the principal for jurisdiction. Texas Trading & Milling Corp. v. Federal Republic of Nigeria, 647 F.2d 300, 314 (2nd Cir. 1981); Gilson v. Republic of Ireland, 682 F.2d 1022, 1026 n. 16 (D.C.Cir. 1982). Jurisdiction over the principal under federal law may be based upon the acts of an independent contractor representative who acts as an agent for the corporation. Gelfand v. Tanner Motor Tours, Ltd., 385 F.2d 117, 119-121 (2nd Cir. 1967). California law is the same. Cosper v. Smith & Wesson Arms Co., 53 Cal.2d 77, 82-84, 346 P.2d 409 (1959); Regie Nationale Des Usines Renault v. Superior Court, 208 Cal.App.2d 702, 703-704, 25 Cal.Rptr. 530 (1962).

A tort committed by an agent in the United States is sufficient for subject matter jurisdiction over the principal under the FSIA. Gilson at 1026 n. 16; H.R.Rep.No. 1487, 94th Cong.2d Sess. 19 (1976), *reprinted in* 1976 U.S.Code Cong. & Admin. News 6604, 6617 ("a representation in the United States by an agent of a foreign state"); and under California law. Indiana Ins. Co. v. Pettigrew, 115 Cal.App.3d 862, 867, 171 Cal.Rptr. 770 (1981); Magnecomp Corp. v. Athene Co., 209 Cal.App.3d 526, 531, 257 Cal.Rptr. 278 (1989).

VIII. CONCLUSION.

The petition for certiorari should be denied.

Dated: November 17, 1994
Belmont, California

Respectfully submitted,

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